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[*Reynolds v. Northeast Nuclear Energy Company*, 94-ERA-47 \(ALJ Dec. 1, 1995\)](#)
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Date: December 1, 1995

Case No.: 94-ERA-47

File No.: 94-107-09691

Clarence O. Reynolds
COMPLAINANT

against

Northeast Nuclear Energy Company
RESPONDENT

Appearances:
Katrena Engstrom, Esq.
For Complainant

Charles C. Thebaud, Jr., Esq
Laura A. Livaccari, Esq.
Mary F. Riley, Esq.
For the Respondent

Before: DAVID W. DI NARDI
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the Energy Reorganization Act of 1974 as amended, 42 U.S.C. § 5851 ("Act" or "ERA"), and the implementing regulations found in 29 C.F.R. Part 24, whereby employees of licensees or applicants for a license from the Nuclear Regulatory Commission and their contractors and subcontractors may file complaints and receive certain redress upon a showing of being subjected to discriminatory action for engaging in a protected activity. The undersigned conducted ten (10) days of hearings in New London, Connecticut between April 24, 1995 and May 5, 1995, at which time the parties were given the opportunity to present oral arguments, their witnesses, and documentary evidence.[1] Counsel for Respondent, by letter dated June 23, 1995 (RX 85A), has filed the September 2, 1994 letter from John F. Opeka to Joseph R. Gray at the NRC (RX 86), the Station Procedure Cover Sheet (RX 87), the June 6, 1995 deposition testimony of Michael J. Ross (RX 88) and the Respondent's 1995 Employee Handbook: *You and Your Job* (RX 89). Complainant has no objections to these exhibits and they are

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admitted into evidence. Complainant's brief and reply brief have been admitted as CX 69 and CX 70 and the Employer's brief and reply brief have been admitted as RX 90 and RX 91. The record was closed on August 28, 1995, upon the filing of the reply briefs.

Summary of the Evidence

COMPLAINANT'S VERSION

Clarence O. Reynolds ("Complainant" herein) submits that, in the course of his work at Unit 1, Millstone Nuclear Facility, he periodically came across or noticed what he considered to be safety concerns. He followed the procedures developed by Northeast Nuclear Energy company ("NNECO" or Respondent) to report the concerns and, until 1990, he experienced no adverse consequences. Starting in 1990, he was at first discouraged, and later disciplined by his employer on a number of occasions which were closely linked in time to his raising of safety issues. In general, his concerns were dismissed by management. The evidence presented by the Complainant is sufficient to raise an inference that the actions of the Respondent were motivated at least in part by the protected activity. *Machowiak v. University Nuclear Systems, Inc.* 735 F.2d 1159 1162 (9th Cir. 1984), *Kenneway v. Matlock*, 88-STA-30 (1989). Complainant also submits that Respondent has not produced sufficient evidence to demonstrate that its decisions to discipline and terminate him were made for legitimate business reasons and that it is unclear why he was required to participate in a Performance Improvement Program in March, 1992. He was informed about the program shortly after he mentioned problems with storage of quality assurance materials in the maintenance area. (CX 7) In late February, he became ill with bronchitis and pneumonia and was out of work for several weeks. He had met all requirements of the Respondent to provide documentation of illness from his physician. During the fall of 1991, he had also raised a question about a large crack in the fifth floor and fourth floor ceiling of the reactor building. (CX 4)

In 1992, after he sought out a Nuclear Regulatory Commission (NRC) representative and expressed concerns about his reports of safety issues and subsequent disciplinary action, the NRC began to make inquiries at Unit One, and as they reviewed the specific safety concerns which had been raised by the Complainant, Unit One management became aware that the Complainant had contacted the NRC. In November, 1992, Complainant was subjected to a warning and reprimand on two occasions; he was accused of

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sleeping during part of a staff meeting, and he was reprimanded for leaving work early to go to a doctor's appointment on a Friday.

In April, 1993, the Complainant made an inquiry about possible hydrogen build up at the base of the stack, and suggested that a different testing procedure be developed to

protect workers. In June, 1993, he was denied an overtime assignment by Roger Boyer, although everyone else in the unit was called in for the job. In August, 1993, the Complainant was suspended for three (3) weeks after Neil Bergh concluded that he had left an overtime assignment on Sunday, August 8th, approximately forty (40) minutes early. The Complainant has maintained throughout this proceeding that his work for the day was complete, that the foreman on the job let the workers go and that he' left for the day instead of returning first to the maintenance shop. He encountered Mr. Bergh as he was walking out of the gate that afternoon and greeted him.

Witnesses for the Complainant testified that he was singled out for particularly harsh monitoring and employee discipline from 1992 through 1994. (TR at 1885, Robert Murphy) These workers testified that they often left the site when overtime assignments were complete, and that this was a customary practice. Since overtime is a voluntary choice for employees, when the job is complete, they are permitted to leave.

Robert Murphy testified:

"They'd put pressure on Pete's co-workers Now, like if I was working with Pete between '92 and '94, there are certain things I would do. I'd say let's go to break early or something, and Pete would say, I can't do it. I got to stay on the job. I can't do this, I can't do that ... Normal, easy-going work routine was not with him, because he was under a microscope, and as far as I'm concerned, and talk amongst the guys, this man was held up to ridicule, held up to whatever. I don't know how he lasted. I would have been out of there in six months. He lasted two years." (Id.)

Jack Haley also testified that the procedure for leaving the site if an employee had an appointment was reasonable and flexible for other workers at Unit One. He stated that if he had to leave he would notify his supervisor. Referring to his supervisor in 1994, he said,

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"I just, you know, I could probably have gone and they wouldn't know the difference, but I'd tell somebody. It'd probably be Frank or somebody that I worked with and tell them that if they're looking for me, I had to go to the dentist or something." (TR at 1850, Jack Haley)

In August, 1993, Mr. Bergh apparently spent several days piecing together a possible scenario in which he could accuse the Complainant of attempting to falsify his time card. The cards were one source of information used by supervisors and management to determine the time worked by employees. The Complainant testified that during the week of August 9th, he attempted to change his time sheet at Unit 3, where he had worked Sunday,

August 8th, but the secretary told him that she was unable to locate the sheet. (TR at 445) The Complainant had filed his time sheet before he started working on that date, and had been told he would be working ten hours (TR at 430) In fact, the Complainant had not been paid for two hours of overtime the previous week, and he contacted the secretary at Unit 1 to request alterations, pointing out both errors. (CX 65, CX 66) On August 2, 1993, he had worked twelve (12) hours, but had been paid for ten (10) hours. (CX 65, CX 67) These circumstances were apparently not taken into consideration by Mr. Bergh when he suspended the Complainant indefinitely on August 12, 1993.

The instances of employee discipline are evidence of a suspicious pattern of circumstances in which it appears that the Complainant was treated differently from other mechanics at Unit One. Robert Murphy further testified that the work rules were applied to the Complainant in a manner which was different from and much more stringent than any other employee, remarking:

"After Pete was fired, they come out and they started reading these rules all of a sudden. You will see your supervisor if you have to go off site. You will see your supervisor if you have to go to the credit union. These were never even brought up in all the years that I have been there." (TR 1888)

Complainant submits that he was disciplined and terminated because he persisted in raising nuclear safety issues.

The Complainant asked a number of questions about working conditions, appropriate work procedures and possible structural problems at Unit One from 1991 through 1994. His actions required the managers at Unit One to analyze, examine and respond

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to him, other managers at Millstone, and to the NRC on the issues he had raised. He had raised issues in the past and had been specifically commended by the previous Director at Unit One. But his initiatives were not encouraged after Neil Bergh became the Unit Director. Supervisors, such as Roger Boyer, were told to discourage this activity and monitor his conduct carefully. (CX 59) After a meeting on November 30, 1992, when the Complainant was reprimanded by Mr. Bergh, with Roger Boyer present, Mr. Boyer told the Complainant that he had been forced to cover himself, and that he did not want to become involved in "all this expletive". (Tape recording, Pete A, CX 59)

Complainant essentially submits that the evidence shows a pattern of the Complainant speaking out or raising a question about a safety issue, followed by some type of employee discipline shortly thereafter. This type of circumstantial evidence, together with the evidence of differential treatment, creates an inference that he was being punished for his initiatives. Complainant's reports of safety concerns were contributing factors in the actions taken against him by the Respondent which resulted in his discharge in June, 1994,

according to Complainant's basic thesis.

RESPONDENT'S VERSION

On the other hand, Respondent submits that it properly terminated Complainant's employment because years of rehabilitative efforts failed to correct his longstanding pattern of disruptive behavior, disrespectful conduct, tardiness, absenteeism and an overall lack of dependability. Complainant, rather than heeding management's repeated admonitions, continued a course of self-destruction, becoming increasingly uncommunicative, resentful and confrontational. As the spiral of misbehavior continued, the warnings became clearer and more pronounced. Even the clarity of a final, all-inclusive warning failed to strike home.

Then Respondent finally terminated Complainant's employment on June 27, 1994, it did so with the knowledge that it had long since exhausted all reasonable alternatives. Assuming, arguendo, that Complainant may have raised safety concerns while an employee, such is entirely unrelated to his employment misconduct and the resulting discipline. And it played no role at all in Respondent's decision to terminate his employment. Complainant alone bears the responsibility for that decision.

Respondent further submits that the legal framework

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applicable to this case is not in doubt. To establish discrimination under the Energy Reorganization Act of 1974, as amended ("ERA"), Complainant bears the burden of proving all of the following:

- (1) Respondent is an employer subject to the ERA;
- (2) Complainant engaged in protected activity;
- (3) Respondent knew that Complainant engaged in protected activity;
- (4) Respondent discharged or otherwise discriminated against Complainant with respect to his compensation, terms, conditions, or privileges of employment; and
- (5) Respondent took the adverse action because Complainant engaged in the protected activity.

Respondent submits that this Administrative Law Judge may determine that a violation of the ERA occurred only if Complainant proves that the protected activity was a contributing factor in the discharge.[2] Even then, however, he may not order relief if Respondent demonstrates that it would have discharged Complainant in the absence of any protected activity.[3] Although some question may exist as to whether Respondent must show the legitimacy of its decision by producing "clear and convincing" evidence, or whether it need only produce a "preponderance" of the evidence, the clarity of the facts in

this case remove the opportunity for controversy. An analysis of all the evidence establishes that Complainant has failed to carry his initial burden and, moreover, that Respondent met the higher burden and proved by clear and convincing evidence that it would have terminated Complainant's employment regardless of any alleged protected activity.

The key to this case lies not in theoretical discussions of shifting burdens of proof, persuasion or production. The key is credibility. Whom do you believe: Complainant and his witnesses or Mr. Bergh, Mr. Haynes, Ms. Fleming, Mr. Pawloski, Ms. Cregeur, Mr. Arensault, and the other Respondent witnesses who testified about the specific events underlying Complainant's discipline?

The passage of time and the interruption of other cases may blunt recollections and perceptions formed during the hearing -- perceptions that were once focused and sharp. As the following discussion of the evidence unfolds, however, the candor and

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demeanor of Respondent's witnesses will again surface and take their rightful place of importance in the weighing of the evidence. So, too, the careful testing of Complainant's testimony will again spotlight an unending string of inconsistencies and fabrication, which preclude reliance on or accepting his word.

Respondent further submits that Complainant's undependability and poor communication skills played central roles in the disciplinary events from 1992 rough 1994 that culminated in Complainant's discharge. These performance and character deficiencies however, were neither new nor recently recognized. Indeed, in the early years of Complainant's employment -- long before any signs of protected activity arose -- Respondent identified these same flaws in Complainant's performance. This historical fact refutes any suggestion that Respondent used the discipline that ultimately followed as a pretext for retaliation. To the contrary, the evidence reveals an unmistakable weakness in Complainant's performance, which, despite Respondent's repeated rehabilitative efforts, he never corrected.

For example, in only the second year of his employment with Respondent, Complainant's second-level supervisor, Mr. Richard L. Peterson, recognized that his use of time, promptness, attendance, and overall dependability required improvement. (RX 67) Mr. Peterson also noted that Complainant's work production varied depending upon the supervisor and whether Complainant got along with that supervisor. (TR 1588) Additionally, Mr Peterson observed that Complainant's communicative skills required improvement because he was reluctant to provide information, sometimes requiring a supervisor to "pull" the information out. (TR 1587)

In 1983, these performance deficiencies continued. Complainant's composite Employee Development Report ("EDR") noted that his "[attendance record [was better than last report; with room for improvement." (RX 68) In fact, Complainant's supervisor,

Mr. Robert Lord, reported that Complainant had a "poor" attendance record (Id. at 2) and Mr. Peterson described it as "lousy." (Id. at 4)

Complainant's dependability in 1984 continued to need improvement. That year, his composite EDR again noted that he "could improve on [starting or sick] time." (RX 69; TR 1596)

Respondent points out that matters worsened considerably in 1985. Complainant's composite review noted his "very poor

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attendance record." (RX 71) Individual supervisors also commented on his lack of dependability. Specifically, Mr. Lord wrote, "Sometimes tardy. Has very poor attendance record." (Id. at 2) Likewise, Mr. Peterson concluded that Complainant's attendance was "deplorable." (Id. at 3; TR 1602) And another supervisor, Mr. John Norris, noted that Complainant's "promptness is sometimes in question." (RX 7 at 5) Complainant's Employee Attendance Record confirms these observations. In 1985, he took 111.5 hours of sick leave and 65.5 hours of other excused time off. (RX 70)

According to Respondent, these pre-existing and chronic deficiencies ultimately led to below-average performance evaluations and, in certain instances, discipline, disproving any inference that management fabricated evidence against Complainant or created a pretext for discipline.

The problems identified in Complainant's early years became more pronounced and more apparent over time. In the late 1980s and early 1990s, he engaged in conduct which not only reflected an unwillingness to correct his deficiencies, but also reflected an attitude of defiance and disrespect for authority.

From approximately 1988 through the first nine months of 1992, Complainant's conduct deteriorated significantly.

Respondent points out that Complainant's lack of dependability continued to be a problem in the ensuing years, that he continued his excessive use of sick leave and personal time (RX 70), that his communicative skills worsened and he developed a domineering and uncooperative attitude resulting in counterproductive exchanges between Complainant and personnel in other departments (TR 1606), and that Complainant's character and performance traits, which in later years caused significant problems, existed long before Mr. Bergh took over the Maintenance Department and, more important, long before Complainant raised a safety concern. Although some periods of normalcy certainly occurred, they were too often broken by disturbing episodes of disruptive behavior. many of these episodes could easily have resulted in discipline; yet management chose counseling and constructive engagement.

Respondent further submits that consideration of this period, therefore, requires an examination of some of the specific episodes of misconduct, Complainant's attendance of record and his annual performance reviews. Again, the purpose of

this review is not to critique his overall performance during this period, but to recognize that the discipline and discharge

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that ultimately followed have their origins in a time free from the sometimes complicating light of protected activity.

The acts of misconduct cited by Respondent are as follows: The intentional puncturing of a condenser tube (TR 1280-1285); Complainant's Employee Development Report for 1989 reflects that Complainant "can easily intimidate peers" and that he is "capable of disrupting communications," although there was "some improvement with lateness" (RX 10); the screenhouse incident highlights Complainant's disruptive nature and his "I know best" attitude. While Complainant and a crew were removing damaged screens from the Unit I screenhouse, Mr. Lord saw what he considered to be an unsafe act. Specifically, Complainant had inserted pin wrenches in a large broken screen frame that was being lowered to the ground by a crane. (TR 76-77) Mr. Lord stopped the job, fearing that the workers with the pin wrenches might be hurt if the screens broke. Complainant conceded on cross-examination that Mr. Lord was right to stop a job he considered unsafe.[4] Despite the propriety of Mr. Lord's action and despite the fact that Mr. Lord was his supervisor, Complainant publicly berated and insulted Mr. Lord, yelling at him, "You don't know what you're doing. That's why they made you a supervisor." (TR 377,375)

This incident validates the deficiencies identified by Complainant's supervisors during his early years at Millstone as well as his 1989 performance evaluation. Specifically: (1) Complainant's work varies with his perception of supervision; (2) he is disrespectful and disruptive; and (3) he displays unreasonably little tolerance for the opinions of others. These characteristics, in turn, inhibit constructive communication and create organizational problems.

Respondent points out that Complainant's 1990 Employee Development Report did not show any improvement and he received a "2," a rating signifying that he "occasionally falls short of expectations" (RX 11), and that his performance in 1991 was deplorable as both the severity and frequency of his misconduct increased but Respondent, rather than disciplining Complainant, continued to seek his cooperation in correcting his behavior. This year was highlighted by Complainant's confrontation with Mr. Arcari, the upgraded supervisor, wherein he challenged and questioned Mr. Arcari's intellect and skill. (RX 13; TR 838) Respondent points to a similar confrontation in 1991 with Mr. Emory, a confrontation again ending with expletives uttered by Complainant at a co-worker. (TR 843; RX 13 at 2) Moreover, during a Maintenance Department meeting in 1991, Complainant was

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disrespectful and insubordinate to Mr. Bergh by interrupting him and cursing at him. (TR 840) While Mr. Bergh could have disciplined Complainant for that offensive conduct which undercut "the ethic of teamwork and cooperation" that Mr. Bergh had been

trying to establish. (TR 840-842)

Respondent points out that Complainant has also showed disrespect to the department engineers by challenging their technical skills and usually punctuating the confrontations with expletives. (RX 13 at 2; TR 844). Moreover, in June of 1991, Complainant refused to obey the proper instructions of Health Physics technicians. (TR 1198) Complainant also received a "2" rating for 1991 as he did not show the expected improvement. He continued to maintain a deplorable five-year average of more than 100 hours of sick leave per year. (RX 12 at 2, RX 70) While Complainant filed a grievance for that 1991 evaluation alleging retaliation for raising safety concerns, Respondent submits that the allegation is not corroborated by the record. In March of 1992, Complainant was placed in the Performance Improvement Program ("PIP") (RX 14) with the expectation that his attitude and performance would improve. However, he performed very poorly during the PIP and Mr. Bergh's "good faith gesture" (TR 859) was greeted with renewed hostility, disrespect, as well as an uncooperative and unreliable attitude. (RX 19 at 2-3)

As early as July of 1992, Complainant was "on the brink of termination" (TR 869); and Mr. Bergh, trying another approach to save Complainant's job, decided to try a new approach and have Complainant define, in his own words, his performance criteria. (TR 869) Even this approach at another chance was rebuffed by Complainant's flippant remarks, such as being "a professional required that he "turn the other cheek." (TR 875) A second PIP was instituted in August of 1992 to give Complainant another chance. While there was some improvement in performance, Complainant did not demonstrate a fundamental change in attitude and Mr. Bergh did not believe that Complainant "was a full member of the team". (TR 890)

According to Respondent, Complainant's attitude and performance worsened beginning with the sleeping-on-duty incident on November 13, 1992 (TR 896), followed by his unauthorized early departure on November 20, 1992. (RX 33; TR 902, 1309-1311) This conduct is reflected in his 1992 Employee Development Report. (RX 34) Complainant also failed to call in to his department during an important emergency drill on January 13, 1993 (TR 926) and, in what constitutes egregious conduct, he had an unauthorized early departure on August 8, 1993, then submitted a

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false time sheet and made false statement in an attempt to cover-up the situation. (TR 426, 429, 965-968, 1628, 1553, 973-974, 978, 1864, 980-984, 988, 1531, 990, 1515-1518, 1532; RX 41, RX 65, RX 3 at 4-5, RX 42; CX 15 at 7) Complainant was suspended for fifteen (15) days without pay for that violation of Respondent's rules. (RX 42) Complainant's Employment Development Report for 1993 reflects an overall rating of "3" based on the unauthorized early departure and suspension in August of 1993, as well as his excessive sick leave -- 61.5 hours -- almost twice the company average. (RX 43 at 2; RX 76) Mr. Bergh attempted to take a conciliatory approach by giving Complainant an overall rating of "3", although he actually deserved a "2", as this

latter rating would have resulted in immediate termination. (TR 1000-1001; RX 43)

On February 3, 1994, Complainant unleashed an unprovoked verbal assault on unsuspecting HP (health physics) technicians as Complainant set off an alarm as he passed through a personnel contamination monitor ("PCM") leading to the Unit I Maintenance Department. (TR 1216; RX 44 at 1) Mr. Bergh looked into the situation and Mr. Boyer concluded that Complainant's attitude was disruptive and "verbally abusive". (TR 1329) In March of 1994, Complainant was disrespectful to Mr. Bergh by ending a conversation with some not-too-flattering comments (TR 1011) and again Mr. Bergh stayed his hand and declined to discipline Mr. Reynolds, hoping that another chance might spur Complainant to improve his disruptive attitude. However, two days later, Mr. Bergh saw Complainant sleeping at his work bench (TR 1013, 1016) but again, Mr. Bergh stayed his hand by simply sending to Complainant a note inviting (him) to come back into the fold". (TR 1020)

In April of 1994, Mr. Bergh temporarily assigned Complainant to work with the Procedure Upgrade Group (TR 1032) and Complainant did not object to the transfer. (TR 1032) An independent investigation into Complainant's alleged concern for his personal safety led to the conclusions that the pipe trench and sump pump arrangement could not have resulted in his receipt of an electrical shock (RX 7) and that there was no evidence to support the concern that supervision at Millstone Unit I is trying to create an environment that would cause Complainant personal injury, induce him to be discharged or to voluntarily resign from Millstone Station". (RX 7 at 2)

The final events herein began with the mid-day disappearance of Complainant on Friday, June 17, 1994, at which time Mr. Bergh went to Complainant's work area in the Procedure Upgrade Group to

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contact him about a transfer to the so-called "I" team. Complainant was not there and Mr. Bergh received no response to the "page". Later that day, Mr. Bergh received a telephone call from a former supervisor in his department that he saw Complainant sitting in a van in the parking lot earlier that day. (TR 1047) On Monday, June 20, 1994, after Mr. Bergh told Complainant that he had to cancel an "I" team meeting because he could not be reached, Complainant replied that he had a physical examination. (TR 1050-1051) Complainant gave various excuses for leaving the so-called protected area, including a conversation in his automobile with Anthony Ross, as well as several other belated and unconvincing explanations. (TR 1052-1054, 1572-1573, 519-526; RX 3 at 8) Complainant, by his own admission, was away from his work-site for about ninety minutes. (TR 1721, 533-537; RX 3 at 9-10)

With yet another unauthorized absence by Complainant to contend with, Mr. Bergh contacted Ms. Fleming and requested that she consider termination. (Tr 1059) Ms. Fleming discussed the

matter with Mr. Bergh and Mr. Haynes and then contacted Mr. Pawloski at the corporate Labor Relations office to solicit his advice. (TR 1715) Mr. Pawloski met personally with Mr. Bergh and Mr. Haynes to review the details of the latest unauthorized absence and to ensure himself that termination was warranted. Mr. Pawloski concluded that termination was not only appropriate, given Complainant's prior history of discipline, but that it was also consistent with other disciplinary action taken throughout the Northeast Utilities System. Mr. Pawloski also found nothing that led him to even suspect that the raising of safety concerns played any role in the decision to terminate Complainant's employment. (TR 1667-1669)

Similarly, Ms. Fleming testified that Complainant's termination was perfectly consistent with the company's policy of constructive, progressive discipline and totally unrelated to the raising of safety concerns. In particular, Ms. Fleming noted that when the company suspended Complainant in 1993, he received a final, all-inclusive warning that any additional disciplinary problem, even if dissimilar to his unauthorized early departure, could result in termination. The fact that the June 1994 episode involved another in a series of unauthorized absences conclusively established for her the propriety of the decision to terminate. (TR 1716)

Respondent terminated Complainant's employment on June 27, 1994, citing his unauthorized absence and discipline in November 1992, his unauthorized absence and suspension in August 1993 and

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his most recent unauthorized absence in June 1994. (RX 52)

COMPLAINANT ON REBUTTAL

Complainant submits that he has established a *prima facie* case of retaliatory discharge under the Act's employment protection provisions as he has introduced evidence that he engaged in a variety of protected activities under the statute. He gave his supervisors reports of unsafe conditions and safety violations. He participated in NRC investigations of his complaints. He questioned work procedures which he believed endangered himself and other workers. He raised questions about quality controls and management of radioactive materials. He did not go out of his way to find problems, but simply encountered them in his daily activities based upon the work orders he was given. He made a number of suggestions to improve safety procedures and eliminate problems. Occasionally, he refused to complete a work order until a safety issue was explained or resolved. All of these activities come within the definition of protective activity under the Act's employee protection provision.

Respondent was aware of these activities because Complainant reported the matters to his direct supervisors before he sought out other resources.

On a number of occasions, beginning in 1990, Complainant was

subjected to adverse employment actions, and he was finally terminated shortly after he sought a permanent transfer out of his regular assignment at Unit One, Millstone. When he reported unsafe conditions on exterior metal and wood ladders in 1990, his supervisor removed him from the job. (TR 1916) Several months after he raised questions about a possible leak in the ceiling of Unit One and a substantial crack in the floor, and after he questioned storage of quality assurance materials in the maintenance shop, he was required to participate in a Performance Improvement Program in March of 1992. Although Complainant complied with the new requirements imposed by his supervisors, his attitude and communication skills were severely criticized, and he was referred to the Employee Assistance Program in June, 1992. His safety concerns were generally dismissed by management. (CX 4, CX 7, CX 22)

In April of 1993, the Complainant raised a question about current procedures to test for hydrogen build up at the base of the Millstone stack. He suggested an alternate testing procedure which would protect the worker if there were unsafe levels of

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hydrogen present at the time of testing. (There was an explosion in 1979 involving this part of the facility.) He sent a memorandum to Neil Bergh, but he did not receive a response until approximately six months later. (TR 102, 287) At that time, a senior engineer, Charles Wargo, responded to his concerns, and there was subsequent follow-up by other managers.

Two months after he sent this memorandum to Mr. Bergh, in June, 1993, he was denied over-time work, although every other mechanic was assigned overtime. In August, 1993, he was Suspended indefinitely by Neil Bergh, the Manager of Unit One, after he left his shift 45 minutes early. He encountered Mr. Bergh, as he left the gate that Sunday evening, and bid him good night. At the time, he believed he had been dismissed by the job crew leader and their task was complete. The Complainant was also accused of falsifying his time sheet for Sunday, August 8th, although he had not been credited for two hours of work during the previous week. During the week of August 9th, he contacted the secretaries of Unit 3, where he had worked on Sunday, and Unit One, to notify them that both corrections were necessary to establish his correct pay rate for those dates. The alterations were accomplished prior to the due date for payroll administration, but Neil Bergh took adverse employment action irrespective of those facts. He was only reinstated in his position after he filed an unemployment compensation claim on September 2, 1993.

Complainant testified that during the first 86 work days of 1994, he was not assigned any work on 36 days. (TR 1922) Even after Complainant specifically requested work assignments from Neil Bergh, he did not receive work orders. (TR 1924) He tried to keep busy and although he was under-employed, he performed menial maintenance tasks. Although he had worked with contractors in the past during "fuel re-outages", he was not assigned to work with them during the winter of 1994. Instead,

Jack Haley, another senior mechanic, was taken from a desk job on the "I Team" and assigned to work on the re'fuelling project. Jack Haley wrote a memorandum to Neil Bergh protesting the assignment and suggested that Complainant be given the task, since he had handled the work in prior years; however, Mr. Bergh refused. In effect, Complainant was completely shunned by management. His co-workers noticed the differential treatment and testified about it during the hearing. By June, 1994, Robert Murphy, a co-worker, noticed that Complainant had not been given work assignments for a two week period. (TR 1893)

After the pipe trench incident in April, 1994, Complainant

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became concerned for his safety and mentioned it to Mr. Drexel Harris. Roger Boyer, his supervisor, testified that if he had observed the electrical condition which Complainant reported to him, he (Boyer) would have been alarmed and taken the same steps to disconnect the pump. This incident led to a temporary transfer of Complainant to work with a contractor at Unit One, researching work order procedures.

That spring, Complainant contacted a senior manager and expressed a strong desire to transfer into a new position. It was determined, perhaps by senior management, that he would be transferred out of a regular maintenance position. Complainant testified that direct supervisors, such as Richard Peterson and Roger Boyer, ridiculed him and told him that he was heading back to their work group and that he would not get out.

In June, 1994, Complainant was terminated after Mr. Bergh determined that he was off-site improperly on personal business. Mr. Bergh did not accept his explanation for his trip to the main building. On June 17th, Complainant had gone to the personnel office, the NRC office, the library and had met a fellow worker in the parking lot to deliver a copy of the employee handbook. He sat in the co-worker's car and talked for about 20 minutes. This was the incident which resulted in discharge. He was away from his desk for approximately an hour and a half, but that time was used for work related purposes. Complainant's delivery of the employee handbook should have been considered a work related activity.

RESPONDENT ON REBUTTAL

Respondent submits that Complainant's brief, rather than proving his case, confirms the absence of a case. Bereft of an acknowledgment or analysis of Respondent's evidence, Complainant resorts to the repetition of unproven allegations.

To prove the legitimacy of his discharge, Respondent produced years of contemporaneous documentation and the corroborating and interlocking testimony of a series of unbiased witnesses. Complainant's Initial Brief does not challenge or refute this evidence. It ignores it. Complainant, pretending that allegations are proof, creates an argument that is wafer thin. His argument contains three parts: (1) a litany of alleged

safety concerns; (2) a barely-recognizable description of his history of discipline; and (3) the surgical extraction of selected lines of unsupported testimony.

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Responding at length to Complainant's argument carries a risk that a modicum of attention may disguise his argument as an argument of some substance. The strength of Respondent's evidence, however, precludes the creation of that illusion. Rather, as Respondent dismantles his allegations, the legitimacy of Respondent's actions and the propriety of its motive again become apparent. And the protracted pattern of misconduct, disrespect and disobedience that characterized Complainant's employment history will again confirm that he alone bears sole responsibility for his discharge.

Respondent submits that Complainant failed to carry his ultimate burden of proof, that Respondent properly handled Complainant's alleged safety concerns, that this handling confirms the absence of a retaliatory motive, that Complainant has failed to present any evidence suggesting that the basis for his discharge was pretextual, that Complainant's attitude was disruptive, uncommunicative and non-cooperative, that such attitude warranted the progressive discipline administered by Respondent, that the selected excerpts of testimony from Complainant's friends fail to raise an inference of discrimination and that Complainant's actions on June 17, 1994 in being absent for ninety minutes from the protected area warranted termination.

In conclusion, Respondent submits that in the ten days of hearing, one central truth emerged. Respondent terminated Complainant's employment because he failed to correct years of disruptive behavior, disrespectful conduct, absenteeism, tardiness and an overall lack of dependability. That Complainant may have raised safety concerns does not diminish the clarity or force of this truth. Indeed, any protected activity that he may have engaged in played no role in the discipline that he received or in his eventual discharge.

Rather, Complainant's discipline and discharge arose exclusively from his non-protected, inexcusable behavior -- behavior that Respondent took extraordinary steps to prevent and to ignore by giving him other chances to correct his behavior. In fact, Respondent's continual efforts to rehabilitate Complainant stand in stark contrast to his intransigence and dogged refusal to obey the simplest of requirements. For years, Respondent reacted to his rebukes with renewed efforts to gain his support and to make him a successful employee. Regardless of the form that these efforts took -- whether counseling, coaching, warnings, or discipline -- Complainant refused to change. And, in continuing his course of confrontation, Complainant marched inexorably to his discharge.

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On the basis of the totality of this closed record and having observed the demeanor and having heard the testimony of the witnesses including a less-than-candid Complainant, I make the following:

GENERAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

LEGAL DISCUSSION

The employee protection provision of the Act provides that:

(a) *Discrimination against employee.* (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee) -

(A) notified his employer of an alleged violation of the Act...;

(B) refused to engage in any practice made unlawful by this Act...if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this Act...;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act...or a proceeding for the administration or enforcement of any requirement imposed under this Act...;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act....

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42 U.S.C.S. §5851 (Supp. May, 1993).

The Complainant has the burden of establishing a *prima facie* case of discrimination under the ERA. The complainant must show, by a preponderance of the evidence, that he engaged in protected activity, that he was subjected to adverse action and

that the Respondent was aware of the protected activity when it took the adverse action against the complainant. In addition, the Complainant must produce evidence sufficient to at least raise an inference that the protected activity was the likely motive for the adverse action. see *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA- 2, Sec. Dec., Apr. 25, 1983, slip op. at 7-9. If the Complainant satisfies his burden of presenting a *prima facie* case, the burden of production shifts to the Respondent to produce evidence that the adverse action was taken for legitimate, non-discriminatory reasons. See *Dartey* at 8.

Courts and the Secretary of Labor have broadly construed the range of employee conduct which is protected by the employee protection provisions contained in environmental and nuclear acts. See S. KOHN, *THE WHISTLEBLOWER LITIGATION HANDBOOK* 35-47 (1990). Examples of the types of employee conduct which the Secretary of Labor has held to be protected include: making internal complaints to management, [5] reporting alleged violations to governmental authorities such as the Nuclear Regulatory Commission ("NRC") and the Environmental Protection Agency, threatening or stating an intention to report alleged violations to such governmental authorities, and contacting the media, trade unions, and citizen intervenor groups about alleged violations. *Id.*

Accordingly, to present a *prima facie* case of retaliation under Section 211 of the ERA, Complainant must prove, by a preponderance of the evidence, that:

- (1) Respondent and Complainant are subject to the ERA;
- (2) Complainant engaged in protected activity;
- (3) Respondent knew or had knowledge that he had engaged in protected activity; and
- (4) Respondent discharged or otherwise discriminated against him with respect to his compensation, terms, conditions, or privileges of employment.[6]

To meet his initial evidentiary burden, Complainant must also

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"present evidence sufficient to raise the inference that protected activity was the likely reason for the adverse action." [7]

A *prima facie* case, however, creates only a rebuttable presumption of discrimination. Therefore, even if Complainant could establish a *prima facie* case, Respondent may successfully rebut the case by producing "evidence that the Complainant was subject to adverse action for a legitimate, nondiscriminatory reason." In so doing, "the rebuttable presumption created by Complainant's *prima facie* case showing [will] 'drop from the case.'" [8]

To prevail, Complainant must then "counter Respondent's evidence by proving that the legitimate reason proffered by the Respondent is a pretext." [9] A claimant can meet this burden by showing that the explanation given by the employer is unbelievable or that the unlawful reason more likely motivated the employer. However, as the Supreme Court clarified in *St. Mary's Honor Center v. Hicks*, [10] "[i]t is not enough, in other words, to disbelieve the employer, the fact-finder must believe the plaintiff's explanation of intentional discrimination." [11] "In any event, the Complainant bears the ultimate burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law." [12]

Moreover, in determining whether an employer's proffered reasons for an employment action are pretextual, it is irrelevant whether the employer's business judgment is correct. According to the Secretary of Labor, "[a]n employer's discharge decision is not unlawful even if it was based on a mistaken conclusion about the facts, but a decision violates the Act *only if it was motivated by retaliation*." [13] Thus, "[a]ny pretext determination is concerned with 'whether the employer honestly believes in the reasons it offers,' not whether it made a bad decision." [14] For example, in *Rand*, the U.S. Court of Appeals for the Seventh Circuit explained that a court "[is] not concerned with the correctness or desirability of [the employer's] stated reasons for its action" and "will not second-guess [the employer's] business decisions." [15]

If a Complainant is able to prove by a preponderance of the evidence that the Respondent's decision to release him was based at least in part upon illegitimate reasons, then under a dual motive scenario, the burden shifts to the Respondent to prove by a preponderance of the evidence that it would have released the complainant in the absence of the protected activity. [16]

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In this case, Complainant has not even established a *prima facie* case -- much less has he carried his ultimate burden of proof.

1. *Complainant Failed To Establish A Prima Facie Case*

Complainant has failed to provide any evidence, circumstantial or direct, linking his raising of safety concerns with his discipline and termination.

a. *Complainant's Perceived Motive For Respondent's Actions Is Factually Impossible*

When asked specifically on direct examination why Respondent would seek to retaliate against him by terminating his employment, Complainant responded that his raising of safety concerns had an adverse effect on Northeast Utilities' acquisition of "another nuclear plant," suggesting this provided

Respondent a motive to terminate him. (TR 265) As Mr. Haynes testified, that is "preposterous." (TR 1783)

Accordingly, in view of the foregoing, I make the following:

ADDITIONAL FINDINGS OF FACT

1. Respondent operates the Millstone Nuclear Power Station in Waterford, CT.

2. Clarence O. Reynolds, ("Complainant") became an employee of Respondent in 1980 and worked at Unit I as a Mechanic in the Maintenance Department. (RX 66)

3. In the second year of Complainant's employment with Respondent, his second-level supervisor, Mr. Richard L. Peterson, recognized that complainant's use of time, promptness, attendance, and overall dependability required improvement. (RX 67)

4. In 1983, Mr. Complainant's composite Employee Development Report ("EDR") noted that complainant's [a]ttendance record [was] better than last report; with room for improvement." (RX 68)

5. In 1984, his composite EDR again noted that Complainant "could improve on [starting or sick] time." (RX 69; TR 1596:13-20 (Mr. Peterson))

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6. In 1985, Complainant's composite review noted his "very poor attendance record." (RX 71) In fact, in 1985, he took 111.5 hours of sick leave and 65.5 hours of other excused time off. (RX 70)

7. In 1986, his composite EDR noted the "need[] to improve attendance." (RX 72 at 1) Mr. Peterson called his absenteeism "excessive" and Mr. Lord found his attendance "poor." (*Id.* at 3, *Id.* at 4. In fact, in 1986, complainant used 70.5 hours of sick leave and another 37 hours of excused personal time. (RX 70)

8. Also, in 1986, Complainant's attitude changed for the worse. Complainant developed a domineering and uncooperative attitude which resulted in counterproductive exchanges between Complainant and other departments. (TR 1606:11-23 (Mr. Peterson))

9. In 1988 or 1989, complainant was working with a Maintenance Department engineer, Mr. John G. Law, looking for condenser tube leaks. (TR 1281:19-21 (Mr. Law)) On one particular occasion, they had difficulty finding a known leak to test their equipment. Contrary to the standard practice, and much to Mr. Law's surprise, Complainant punctured the tube with a screwdriver, creating a large rectangular hole in the condenser

tube. This hole created by Complainant required repeated attention and repairs in later years, each time forcing the plant to reduce power to accommodate the repair. (TR 1283-84 (Mr. Law))

10. In response to Mr. Law's testimony, Complainant claimed that it is "almost an impossibility" to be able to punch a hole in a condenser tube with a screwdriver and that if he were using a screwdriver, he would be using it to pry off a rubber plug. (TR 1926:17-20 (Mr. Reynolds)) Complainant's version lacks credibility. Mr. Law convincingly testified in rebuttal that the condenser tubes are made of a soft metal, copper nickel, and can easily be penetrated by a screwdriver in the hands of a person of average strength. (TR 2035:3-19 (Mr. Law)) Mr. Law also stated categorically that he was confident in the accuracy of his testimony because "[he] watched it happen." (TR 2036:19 (Mr. Law)) Moreover, he concluded that complainant had acted "intentionally and deliberately" and that "it was not an accident." TR. 2037:3-12 (Mr. Law)

11. Mr. Neil Bergh became the Manager of the Unit I Maintenance Department in August 1988. (TR 802:6-11 (Mr. Bergh))

12. In Complainant's EDR for 1989, Mr. Bergh observed that

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he "can easily intimidate peers" and that he is "capable of disrupting communications." (RX 10)

13. In October, 1990, while Complainant and a crew were removing damaged screens from the Unit I screen house, Mr. Lord saw what he considered to be an unsafe act. (TR 76-77 (Mr. Reynolds))

14. Mr. Lord stopped the job, which, as Complainant conceded on cross-examination, was the proper course of action. (TR 378:3-8)

15. Despite the propriety of Mr. Lord's action and despite the fact Mr. Lord was his supervisor, Complainant publicly berated and insulted Mr. Lord, yelling at him, "You don't know what you're doing. That's why they made you a supervisor." (TR 375:12-15 (Mr. Reynolds))

16. Despite this obvious example of his disrespect for Mr. Lord, management did not discipline Complainant. (TR 380:19-25; TR 381:1-9 (Mr. Reynolds))

17. Various aspects of Complainant's description of the screen house incident are at odds with the evidence. For example, Complainant told Dr. Murley of the NRC that after his disagreement with Mr. Lord, "[h]e was immediately removed from [his] upgraded position." (CX 15 at 5) He then alleged that after being relieved, he received an electrical shock, which occurred because he was "not properly supervised." *Id.*

18. Complainant was not truthful. On cross-examination, he conceded that his assertion of "immediate" relief was misleading.

(TR 383:3-25 (Mr. Reynolds)) Moreover, the Respondent's daily time sheets confirm that when the accident occurred, at 9:00 p.m. on October 9, 1990, Complainant -- not someone else -- was the upgraded supervisor. (RX 5)

19. Complainant also told Dr. Murley that Respondent concealed the existence of his accident to preserve a lost time record. (CX 15 at 5) That statement was not truthful either. The Respondent's daily time sheets for October 10 and 11, 1990 (RX 5), as well as his annual Employee Attendance Record disprove his allegation. (RX 70)

20. In 1990, as a result of the "screen house" incident, as well as others (TR 828:4-11 (Mr. Bergh)), Complainant received a lower rating in his 1990 EDR in the area of communications. He received a "2", signifying that he "occasionally falls short of

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expectation." (RX 11) To prevent any possible misunderstanding of the seriousness of this shortcoming, Mr. Bergh unambiguously set forth management's expectation in an attachment to his 1990 EDR.

The Department Staff continues to express dissatisfaction and concern for Mr. Reynolds' ability to control his behavior. Mr. Reynolds' treatment of his peers and supervision, can at times be very abusive, condescending and even border on insubordination. This behavior is most disturbing because it detracts from the many constructive qualities Mr. Reynolds has to offer. As in the past, the department staff encourages Mr. Reynolds to reflect on his behavior and assess the need to incorporate constructive change. *Id.* at 2.

21. Complainant's performance in 1991 was deplorable. (RX 13)

22. For example, in 1991, while directing the work of one crew changing a LPCI motor, Complainant inserted himself into the work of another crew and accosted Mr. Arcari, the upgraded supervisor, challenging his intellect and skills. (RX 13; TR 838:1-4 (Mr. Bergh))

23. In an event strikingly similar to Complainant's confrontation with Mr. Arcari, Complainant also had a confrontation in 1991 with another co-worker, Mr. Emory. Hearing Complainant "bellowing" at Mr. Emory, "I've had it with your (expletive deleted)" Mr. Bergh found Mr. Emory, an upgraded supervisor, visibly shaken. (TR 843:16-18; RX 13 at 2 (Mr. Bergh))

24. During a Maintenance Department meeting in 1991, Complainant was disrespectful and insubordinate to Mr. Bergh by saying, "That's the trouble with you (expletive) people. Health Physics takes credit for something we do and nobody stops them." (RX 13; See also TR 840:8-11 (Mr. Bergh))

25. In a similar showing of disrespect, Complainant reacted angrily when Mr. Bergh declined to permit him and others to work overtime while they were in training. (TR 841:10-25; 842:1-6 (Mr. Bergh)) In a tone of voice which Mr. Bergh described as "very derogatory, condescending, [and] flippant," Complainant disparaged Mr. Bergh, saying that if Mr. Bergh could not control the storage of material in the Department, "where did [he] get

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off jerking him out of overtime." (TR 842:2-9 (Mr. Bergh))

26. During the late 1980s and early 1990s, each of the Department engineers independently complained of Complainant's intimidating and disrespectful behavior. (RX 13 at 2)

27. In June of 1991, Complainant refused to obey the instructions of Health Physics (HP) technicians who, during the course of reactor reassembly, directed him to wash off the highly contaminated steam plugs before removing them from the reactor vessel and placing them on the floor. (TR 1198-1200 (Mr. Gault)) Complainant admitted that he walked off the job after Mr. Gault arrived, telling Mr. Gault, "Well, if you want to run the damned job, you can have it, I'm leaving." (TR 1941:21-22 (Mr. Reynolds))

28. Mr. Jack Law was at the scene that day and he specifically recalled Complainant being involved in a "verbal dispute" with the HP technicians. (TR 1285:5-1 (Mr. Law)) Consistent with Mr. Gault's testimony, Mr. Law heard Complainant tell the HP technicians that "[h]e did not want to use a garden hose to decontaminate [the steam plugs]." (TR 1285:23-24 (Mr. Law))

29. In 1991, Complainant received an EDR with a rating of "2" (occasionally fails 'to meet expectations) in the areas of dependability and communication, as well as for an overall rating. (RX 12)

30. Despite repeated acts of disrespect of supervision, disregard for procedures, and contempt for his peers, Complainant received a rating of "2," when a rating of "1" (fails to meet expectations) would have been entirely appropriate. (RX 12) In Complainant's other area of historic weakness, dependability, he continued to maintain a deplorable five-year average of more than 100 hours of sick leave per year. *Id.* at 2. In particular, in 1991, he missed 99 hours because of sickness. (RX 70)

31. Shortly, after his receipt of his 1991 EDR, Complainant asked to meet with Ms. Virginia Fleming, the Millstone Personnel Manager, Nuclear, because he objected to certain entries. (TR 1676:22-24 (Ms. Fleming)) At no point during Ms. Fleming's April, 1992 meeting with Complainant, did he suggest that his EDR ratings were related to the raising of safety concerns. (TR 1682:16-20; TR 2042:16-22 (Ms. Fleming)) Moreover, when he filed an internal grievance with Respondent challenging his EDR, he did

not assert that his protected activity played any role in his

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evaluation. (RX 30 at 4)

32. Complainant received his 1991 Employee Development Report in March of 1992 (RX 12) and, immediately thereafter, began a Performance Improvement Program ("PIP"). (RX 14) As Mr. Bergh and Ms. Fleming confirmed, that program did not constitute disciplinary action. Indeed, Ms. Fleming explained that the program is "a good-faith effort on the part of the company to provide some support for employees who are, for whatever reasons, not meeting the company's expectations." (TR 1690:11-14 (Ms. Fleming))

33. Complainant fought the program, and challenged the fundamental premise that dependability and communication were of comparable importance to the other areas of evaluation, e.g., knowledge, quality, and quantity of work. (TR 849:19-25; 850:1-4 (Mr. Bergh))

35. In mid-May of 1992, three instances of tardiness and a strong expression of opposition to the PIP caused Mr. Bergh to question seriously the likelihood of the ultimate success of the program. (TR 858:5-22 (Mr. Bergh); RX 18)

36. In a bizarre meeting with management on June 12, 1992, . Complainant indicated that he would use the company's Employee Assistance Program to "build a case" against management. (RX 19 at 3; TR 864:1-25 (Mr. Bergh))

37. By early July of 1992, Complainant was "on the brink of termination." (TR 869:1-3 (Mr. Bergh)) His performance remained unsatisfactory and he had yet to demonstrate a willingness to seek a "fundamental, constructive change." (TR 868:20-23 (Mr. Bergh)) In fact, on July 9, 1992, Complainant told Mr. Bergh and Mr. Peterson that he was not going to take this PIP "expletive" much longer. (RX 20 at 3)

38. Mr. Bergh closed out the first PIP on August 3, 1992. Complainant's August 3, 1992, EDR marks the low-point in a series of declining evaluations. Essentially, it describes the performance of an individual on the brink of termination. Complainant failed to perform in accordance with the guidelines established and provided to him on March 17, 1992. (RX 28 at 3)

39. Mr. Bergh created a second PIP for Complainant that -- absent intentional malfeasance -- could not fail because Mr. Bergh had him establish his own standards of performance. (TR 887:8-15 (Mr. Bergh)) Mr. Bergh eliminated the requirement that

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complainant meet regularly with management. (TR 888:1-7 (Mr. Bergh)) Mr. Bergh established a very brief period for the PIP, only about one month, hoping that complainant could be successful for a limited period. (TR 887:14-23 (Mr. Bergh))

40. On Friday, November 13, 1992, Mr. Bergh conducted a meeting for all employees in the Unit I Maintenance Department. (TR 894:10-11 (Mr. Bergh)) At that meeting, he clearly saw complainant "position himself" (TR 896:6 (Mr. Bergh)) with his shoulders and head up against a wall and fall asleep for about half an hour. (TR 894:12-13 (Mr. Bergh)) Complainant, rather than fighting to stay awake, took no action to try to ward off sleep. (TR 895:21-25; TR 896:1-14 (Mr. Bergh))

41. The next work day, Monday, November 16, 1992, Mr. Bergh, Mr. Peterson, and Mr. Boyer met with Complainant to discuss this sleeping incident. (TR 896:15-19; TR 899:1-4 (Mr. Bergh)) admitted sleeping during that meeting and assured Mr. Bergh that he would not let it happen again. (TR 896:21; TR 899:7-8 (Mr. Bergh)) Mr. Bergh then issued Complainant a verbal warning for his misconduct and warned him that another episode would trigger additional discipline. (RX 31)

42. During his direct examination, Complainant testified under oath that when Mr. Bergh met with him on Monday, November 16, 1992, to discuss his sleeping during the Department meeting, "I told him I wasn't sleeping...." That testimony is perjury. A tape recording of that meeting proves conclusively that Complainant admitted to Mr. Bergh that he slept during the November 13, 1992, Department meeting. (RX 1 at 1)

43. In addition to Mr. Bergh, Mr. Peterson also saw Complainant sleeping during that Department meeting. "It wasn't like he was trying to hide it or anything. It was just head back, asleep, you know, then he'd get up, and his head would go that way, and he'd go off again." (TR 1623:1-3 (Mr. Peterson)) Mr. Boyer also attended the department meeting and, watched Complainant sleep. "[Mr. Reynolds'] head was laying back against the wall; his mouth was open; his hands were folded on his chest; very relaxed...I didn't see, you know, his head jerk or anything like that that would have made a sign of trying to stay awake." TR 1306:25; (TR 1307:1, 19-21 (Mr. Boyer))

44. On November 8, 1993, Complainant wrote to Dr. Thomas E. Murley of the NRC and falsely claimed "I did not nod-off or fall asleep during the [November 13, 1992] department meeting." (CX 15 at 6) And on September 6, 1994, in a statement to the Department Of Labor Investigator Neil G. Patrick, Complainant falsely wrote,

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"I have not fallen asleep during meetings." (RX 3 at 3) Finally, while under oath in his deposition, Complainant falsely testified that he denied sleeping the previous Friday during his November 16, 1992, meeting with Mr. Bergh. (TR 332:11-23) At about 1:00 p.m. on Friday, November 20, 1992, Complainant approached Mr. Boyer, commented that "things were slow," and reminded Mr. Boyer that his vacation started the next Monday. (TR 1309:21-24 (Mr. Boyer)) Complainant then asked for permission to leave work early. (TR 1309:24 (Mr. Boyer)) Mr. Boyer replied that he lacked the authority to give him permission to leave early. (TR 1310:1-2 (Mr. Boyer)) Accordingly, Mr. Boyer told Complainant to go ask

Mr. Peterson or Mr. Bergh for permission. (TR 1310:16-19 (Mr. Boyer)) At that point, Complainant changed his story and told Mr. Boyer that he had a doctor's appointment that afternoon. (TR 1310:21-24 (Mr. Boyer)) Mr. Boyer still refused to grant him permission to leave and again directed him to Mr. Peterson or Mr. Bergh. (TR 1311:1-3 (Mr. Boyer)) He then left, ostensibly in search of Mr. Bergh or Mr. Peterson. (TR 1311:14 (Mr. Boyer))

46. Complainant did not receive permission from Mr. Peterson, Mr. Bergh or anyone else, before leaving that day at about 2:00 pm. -- two hours early. (TR 1244-46 (Mr. Wargo); TR. 344:1-9 (Mr. Reynolds))

47. Complainant's early departure and his various explanations of his misconduct further undermine his credibility. For example, in his statement to Department Of Labor Investigator Patrick, he provided a series of false and misleading statements. (RX 3 at 2)

48. Complainant's performance during 1992 -- particularly in light of his misconduct in November -- justified an overall rating of "2" and a dependability rating of "2." (TR 924:5-7 (Mr. Bergh)) Nevertheless, Mr. Bergh and Mr. Boyer gave him a rating of "3" in all areas. (RX 34) As Mr. Bergh explained, after having barely emerged from the two earlier PIPs in 1992, another overall "2" rating would likely force Complainant's termination. Mr. Bergh chose, once again, to give him another incentive and yet another opportunity to turn his performance around. (TR 924:5-18 (Mr. Bergh))

49. On August 8, 1993, Complainant was assigned to the Interplant Maintenance Force ("IMF") at Unit III, (TR 426:11-15 (Mr. Reynolds)) and was scheduled to work for ten hours, from 7:00 a.m. to 5:30 p.m. (TR 429:23-25 (Mr. Reynolds)) But, at 4:35 p.m., about one hour early, Mr. Bergh saw him leaving the protected area, going home. (TR 965:15-25 (Mr. Bergh))

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50. The next day, Mr. Bergh contacted Mr. Michael Gentry, the Manager of the Maintenance Department for Unit III, where Complainant had been working on Sunday, to determine whether Complainant had permission to leave work early. (TR 968:18-24 (Mr9 Bergh))

51. The company gate log confirmed that Complainant left the protected area at the Millstone South Access Point at 4:36 p.m. on August 8, 1993. (RX 37; RX 38; TR. 969-72 (Mr. Bergh))

52. By Wednesday of that week, Mr. Gentry learned that no supervisor released a worker early on Sunday, and, moreover, that no worker asked for an early release on Sunday. (TR 1553:12-15 (Mr. Gentry)) He then' relayed this information to Mr. Bergh. (TR 1533:16-20 (Mr. Gentry); TR 973:1-7 (Mr. Bergh))

53. At about 11:50 a.m., on Thursday, August 12, 1993, Mr.

Bergh and Mr. Peterson met with Complainant to discuss this situation. (TR 973:13-19 (Mr. Bergh); TR 1630:2-6 (Mr. Peterson)) When asked if he had a supervisor's permission to leave early, Complainant deflected the question and indicated that he had completed his work and saw no problem leaving. (TR 974:1-3 (Mr. Bergh); RX 39) Mr. Bergh asked again if he had permission to leave. This time, Complainant replied that his grandchildren were visiting and he wanted to get home to see them. (TR 974:3-6 (Mr. Bergh); RX 39) For the third time, Mr. Bergh asked for the name of the supervisor who authorized his departure. Complainant, again, tried to deflect the question, saying that he did not want to get anybody in trouble. (TR 974:7-10 (Mr. Bergh); TR 1630:11-12 (Mr. Peterson); RX 39) He then indicated that he had adjusted his time sheet to reflect his early departure. (TR 974:12-13 (Mr. Bergh); TR 1630:16-21 (Mr. Peterson); RX 39) When pressed for the fourth time for the name of the supervisor who authorized his departure, Complainant finally said "Al something." (TR 974:11-12 (Mr. Bergh); TR 1630:7-12 (Mr. Peterson); RX 39) He provided no other information about "Al" that would help identify him. (TR 974:16-25 (Mr. Bergh); RX 39) He provided no other information about "Al" that would help identify him. (TR 974:16-25 (Mr. Bergh); RX 39)

54. As Complainant stated that he already adjusted his time entry, Mr. Peterson suggested that they retrieve his time card for Sunday. (TR 978:11-20 (Mr. Bergh)) In accordance with this request, Ms. Haley went to Ms. Cregeur's office at about noon, Thursday, and obtained Complainant's time chit for Sunday, August 8, 1993. (TR 1864:1315 (Ms. Haley); RX 40) Complainant had not

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called Ms. Haley to correct his time card before she went to Ms. Cregeur's office. (TR 1864:16-25; TR 1865:1-3 (Ms. Haley))

55. Contrary to Complainant's representation to Mr. Bergh and Mr. Peterson, the time chit indicated that he worked the full shift on Sunday, ten hours. (RX 40)

56. Mr. Bergh, having learned that Complainant had not adjusted his time chit, and having learned that no "Al" in Unit III had authorized his early departure, Mr. Bergh met for a second time with him on Thursday. (TR 982:20-25 (Mr. Bergh)) Mr. Bergh asked Complainant if the time chit Ms. Haley had retrieved from Unit III was the time chit submitted by Complainant. Complainant confirmed that it was. (TR 983:12-24 (Mr. Bergh)) Mr. Bergh then asked for an explanation of his earlier statement that he had already adjusted his time to reflect his early departure. (TR 984:1-5 (Mr. Bergh)) Complainant replied, "Well, I intended to do it on Monday morning but I guess, I forgot." (TR 984:5-6 (Mr. Bergh); TR 1276:19-22 (Mr. Brown); RX 41)

57. On Monday, August 16, 1993, Mr. Bergh arrived at Ms. Cregeur's office to pick up a packet of Complainant's IMF time cards. Before he left Ms. Cregeur's office, Ms. Cregeur described a recent encounter with Complainant. (TR 989-90 (Mr. Bergh); RX 65.

58. On Wednesday morning, August 11, 1993 (RX 3 at 5), Complainant entered Ms. Cregeur's office, rolled a chair to within two feet of Ms. Cregeur, and took a seat. (TR 1515:20-25; TR 1516:1 (Ms. Cregeur)) In a "very low, very demanding" tone of voice (TR 1518:1-5 (Ms. Cregeur)), Complainant told Ms. Cregeur that he made a mistake on his time card for Sunday and that she should "find it" and "destroy it." (TR 1516:11-13 (Ms. Cregeur)) He told her that he would prepare a "new one" which she would then substitute for the original. (TR 1516:16-17 (Ms. Cregeur)) Complainant told Ms. Cregeur that, if asked, she should say that she made a mistake. (TR 1516:16-17 (Ms. Cregeur))

59. Ms. Cregeur was completely "taken back" by his demands. (TR 1516:13-18; TR 1517:5-7 (Ms. Cregeur)) After asking for Complainant's name, she searched her records for his time card. (TR 1516:21; TR 1518:12 (Ms. Cregeur)) Although she found it, Complainant's extraordinary demands and his intimidating manner caused Ms. Cregeur to tell him that she did not have the record. (TR 1517:12-14 (Ms. Cregeur)) Complainant was "very upset" with this answer and spontaneously remarked, "Well, I guess that's it. They got me now." (TR 1517:14-16 (Ms. Cregeur)) After he left

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her office, Ms. Cregeur moved the time cards to another location, fearing that he would return and take them away. (TR 1517:17-24; TR 1520:3-9 (Ms. Cregeur))

60. After concluding that Complainant had no authority to leave early on August 8, 1993, that he submitted a false time chit, that he falsely told Mr. Bergh and Peterson that he had a supervisor's authority and that he falsely reported that he had adjusted his time records, Respondent suspended Complainant for fifteen days without pay. The suspension letter included a "final, all-inclusive warning" to Complainant about the repercussions of such future misconduct. (RX 42)

61. Complainant's raising of safety concerns played no role in this discipline. (TR 1710:6-11 (Ms. Fleming))

62. In fact, Mr. Pawloski "had no idea" that Complainant had even raised a safety concern. (TR 1666:21-24 (Mr. Pawloski))

63. In Complainant's November 8, 1993, letter to Dr. Murley of the NRC, he wrote that, "Sunday, August 8, was not a normal IMF workday, but I was asked to work with no indication of how long the workday would be." (CX 15 at 7) (emphasis added) That is patently false. As Mr. Gentry, the Maintenance Manager of Unit III, testified, and as Mr. Al Arsenault, a mechanic in Mr. Gentry's department, confirmed, the "standard workday" on IMF was a ten-hour shift, from 7:00 a.m. to 5:30 p.m., including Sunday. TR 1555:20-25 (Mr. Gentry); TR 1497:11-14 (Mr. Arsenault). Even Complainant conceded on cross-examination that the standard workday was ten hours, and that during this period on IMF, he had never worked less than ten hours. (TR 430:5-14 (Mr. Reynolds))

64. Complainant alleged repeatedly that Mr. Al Arsenault was the person who gave him permission to leave work early on

August 8, 1993, and that Mr. Arsenault was an "upgraded" mechanic on that day. Not a shred of evidence supports this contention. Mr. Arsenault -- a disinterested, unbiased witness -- unequivocally testified that not only was he not upgraded on August 8, 1993, but he had never been upgraded since he arrived at Millstone in February, 1993. (TR 1497:15-21 (Mr. Arsenault)) Moreover, Mr. Arsenault testified that after they finished their specific task that day, Complainant indicated that he was going to return to Unit I. (TR 1498:10-12 (Mr. Arsenault)) He did not tell Mr. Arsenault he was planning to leave the site. (TR 1499:6-7 (Mr. Arsenault)) He did not ask Mr. Arsenault for permission to go home and Mr. Arsenault did not give him permission to leave. (TR 1499:8-20 (Mr. Arsenault)) Mr.

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Arsenault did not have the authority to permit him to go home -- a fact acknowledged by Mr. Arsenault, (TR 1499:10-11 (Mr. Arsenault)) confirmed by Mr. Gentry, (TR 1560:1-10 (Mr. Gentry)) and even recognized by Ms. Cregeur. (TR 1519:10-15 (Ms. Cregeur))

65. On cross-examination, Complainant (for the first time) claimed that during his 11:50 a.m. meeting on August 12, 1993, with Mr. Bergh and Mr. Peterson, he told them that "Al something" was a person who recently transferred from the company's Devon Station. (TR 449:5-7 (Mr. Reynolds)) Mr. Bergh (TR 975:16-20 (Mr. Bergh); RX 39) and Mr. Peterson, (TR 1630:13-15 (Mr. Peterson)) categorically denied this. And Mr. Gentry confirmed that, after talking to Mr. Bergh, he thought only of Al Muratore when looking for a possible source of authority. (TR 1554:1-5 (Mr. Gentry)) If Complainant had actually provided the information about a recent transfer from Devon, Mr. Gentry's search would have been over before it began.

66. Similarly, Complainant testified further on cross-examination that at his 3:30 p.m. meeting on August 12, 1993, with Mr. Bergh and Mr. Brown, Mr. Bergh refused to permit Complainant to offer any explanation for his erroneous time chit. That is not true. Mr. Bergh called the meeting for the specific purpose of determining why the hours had not been adjusted. (TR 974:12-13 (Mr. Bergh); TR 1630:16-21 (Mr. Brown); RX 39) Remembering that earlier that same day, Complainant told Mr. Bergh and Mr. Peterson that he had already corrected his time sheet (TR 984:4-5 (Mr. Bergh)) and seeing that the time chit had not been changed, Mr. Bergh asked Complainant, "Could you help me out here?" (TR 984:4-5 (Mr. Bergh)) Complainant replied that he "forgot" to adjust his time. (TR 984:6 (Mr. Bergh)) Mr. Brown, a neutral observer from the Human Resources office, confirmed Mr. Bergh's testimony about the purpose of the meeting (i.e., to allow Complainant to explain his time chit), and confirmed that Mr. Bergh actually afforded Complainant the opportunity to explain the entry on the time chit. (TR 1273:13-15; TR 1274:5-8 (Mr. Brown))

67. The final fabrication by Complainant arising out of his suspension in August, 1993, is a series of fabrications and inconsistencies concerning his intimidation of Ms. Cregeur and

his alleged effort to correct his erroneous time chit. If Complainant merely had an uneventful exchange with Ms. Cregeur, on Wednesday, August 11, 1993, untainted by demands to destroy the time record, Ms. Cregeur surely would have shown him his time chit for the previous Sunday. Complainant concedes, of course,

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that she told him that it was not present (RX 3 at 5) -- even though it was. (TR 1517:14 (Ms. Cregeur)) Additionally, Complainant admitted on cross-examination that he never mentioned his meeting with Ms. Cregeur to his supervisors at the 11:15 a.m. meeting (TR 450:25; TR 451:1-5 (Mr. Reynolds)) or at the 3:30 p.m. (TR 453-54 (Mr. Reynolds)) on August 12, 1993. He did not mention Ms. Cregeur because he did not want Mr. Bergh, Mr. Peterson, or Mr. Brown to contact Ms. Cregeur and ask her about her recent encounter with Complainant. He knew that if she spoke to them, his situation would be grave.

68. Like Mr. Arsenault, Ms. Cregeur did not know Complainant before he entered her office that day. Her credibility is beyond dispute. (TR 1517:12 (Ms. Cregeur); TR 1536:12-24 (Ms. Cregeur))

69. In his statement to Department of Labor Investigator Patrick, Complainant claimed that he "tried to revise the time sheet the following day [Monday, August 9, 1993], but Rose, the timekeeper for Unit 3, was not in on Monday." That is not true. Ms. Cregeur testified, and her time sheet confirms, that she worked ten hours on Monday, August 9, 1993. (TR 1523:20-24 (Ms. Cregeur); RX 64)

70. Similarly, Complainant reported to Mr. Patrick that he "went back [on Tuesday], but she was busy." (RX 3 at 5) Again, Ms. Cregeur testified that she never saw Complainant in her office on Tuesday, never received a note or a message from him or anyone else indicating that he needed to speak to her. (TR 1526:13-25; TR 1527:1-6 (Ms. Cregeur))

71. Complainant also told Mr. Patrick that on Thursday morning, he went back to Ms. Cregeur because the paycheck that he received that day reflected an underpayment for an earlier time period (August 2). To fix the error, Complainant said that Ms. Cregeur called Ms. Haley in Unit I to discuss the problem. He also claimed that Ms. Cregeur hung up before he had a chance to talk to Ms. Haley about his other error, i.e., the Sunday, August 8, 1993, false time chit. (RX 3 at 6) He told Mr. Patrick that he then called Ms. Haley back to explain the Sunday problem and Ms. Haley supposedly replied that she would offset the Sunday, August 8 overpayment against the earlier, August 2 underpayment. *Id.*

72. Ms. Cregeur denied that she called Ms. Haley to discuss Complainant's earlier underpayment problem. (TR 1528:2-7 (Ms. Cregeur)) In fact, she denied having any conversation with Ms.

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Haley in Complainant's presence. (TR 1528:8-11 (Ms. Cregeur))

Nor did Complainant call Ms. Haley to discuss any matter from Ms. Cregeur's office. (TR 1528:12-14 (Ms. Cregeur))

73. Faced with Ms Cregeur's unchallenged testimony, Complainant changed his story on rebuttal, claiming for the first time that, rather than calling Ms. Haley in Ms. Cregeur's presence, Complainant left Ms. Cregeur's office and "went downstairs" to use another telephone to speak to Ms. Haley. (TR 1983:9-13; TR 2009:1-9 (Mr. Reynolds)) Complainant had already testified under oath during his deposition, however, that Ms. Cregeur was present when he called Ms. Haley. (TR 2009:16-19 (Mr. Reynolds); TR 2010:13-20; TR 2013:3-12 (Mr. Reynolds))

74. Complainant did not call Ms. Haley on Thursday morning Ms. Cregeur testified that he did not call Ms. Haley, as he claims. (TR 1528:12-14 (Ms. Cregeur)) Further, Complainant's witness, Ms. Haley, testified that he did not call her Thursday morning before Mr. Bergh and Mr. Peterson confronted him at 11:50 a.m. (TR 1864:24-25; TR 1865:1-3 (Ms. Haley)) Moreover, Ms. Haley categorically *denied* telling him that she would offset any time. (TR 1865-66 (Ms. Haley)) As she explained on cross-examination, "I can't [offset Sunday and Monday time]. I wouldn't have any reason to do that....Monday is a time and a half day and Sunday is a double time day." (TR 1865:9-22 (Ms. Haley))

75. Given Complainant's unauthorized early departure and suspension in August, 1993, his dependability rating in his EDR for 1993 reflected another rating of "2". (RX 43) Complainant's low dependability rating, however, was not based entirely on the August, 1993 incident. As in the past, Complainant continued to have excessive sick leave -- 61.5 hours -- well over the company average. (RX 43 at 2 (Mr. Bergh))

76. Despite these aggravating circumstances, Mr. Bergh did not give Complainant an overall rating of "2", even though under the circumstances, it would have been justified. Again, however, Mr. Bergh took a conciliatory approach to Complainant and rated him as an overall "3." (RX 43) Mr. Bergh gave Complainant this rating because he knew that Complainant could not afford another overall rating of "2." (TR 1001:1-6 (Mr. Bergh)) Had he given Complainant the "2" rating that he deserved, Mr. Bergh would have been compelled to terminate Complainant's employment. *Id.*

77. At about noon on February 3, 1994, Complainant set off an alarm as he passed through a personnel contamination monitor ("PCM") leading to the Unit I Maintenance Department. (RX 44 at 1; TR 1216:14-24 (Mr. Messina)) As the HP technicians responded

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to the alarm, Complainant became extremely upset and began "hollering" at the HP technicians. (TR 1217:22-23 (Mr. Messina)) The senior HP technician at the control point, Mr. Phil Messina, tried to manage the situation by asking Complainant to calm down. (TR 1218:1-18 (Mr. Messina)) Complainant refused to calm down and continued "hollering and screaming," reaching a point at which

Mr. Messina "couldn't reason with him." (TR 1218:18-22 (Mr. Messina)) Complainant then began demanding permission to use a bathroom before he was decontaminated. (TR 1219:4-6 (Mr. Messina)) Mr. Messina replied that he would have to call his office for the authority to permit this. Complainant continued to scream (TR 1219:7-8 (Mr. Messina)), unwilling to wait for Mr. Messina to place the call (TR 1221:6-9 (Mr. Messina)), and trying to "intimidate" Mr. Messina. (TR 1221:13-16 (Mr. Messina)) Eventually, Mr. Messina received permission to release Complainant to allow him to go to the bathroom and return. (TR 1221:24-25; TR 1222:1-2 (Mr. Messina)) Complainant used the bathroom for only ten to fifteen seconds before returning to the PCM. (TR 1222:9-15 (Mr. Messina))

78. On February 10, 1994, Mr. Bergh met with Complainant to discuss the situation. Complainant denied any responsibility for the matter, claimed that his behavior was "reasonable", that he was neither loud nor boisterous, and that the HP technicians were "liars." (TR 1006:15-25; TR 1007:1-21 (Mr. Bergh); RX 45)

79. During the time that Complainant was yelling at the HP technicians, Mr. Messina did not know Complainant's name. (TR 1222:22-24 (Mr. Messina)) Mr. Messina had absolutely no reason to fabricate a story.

80. Furthermore, Mr. Boyer confirmed the truthfulness of Mr. Messina's testimony. He described Complainant speaking "loud[ly]," (RX 57 at 1) "angrily," and "gruffly" to the HP technicians, demanding that they let him go to the bathroom. (TR 1323:2-14 (Mr. Boyer)) Essentially, he found Complainant to be "verbal[ly] abusive." (TR 1329:21-22 (Mr. Boyer)) In contrast to Complainant's behavior, Mr. Boyer described Mr. Messina as "mild-mannered, professional, [and] calm." (TR 1323:15-16 (Mr. Boyer))

81. Complainant paid another visit to Mr. Messina two or three days after Complainant's original outburst at the PCM. On this occasion, Complainant approached Mr. Messina, demanded to know his name and, before Mr. Messina could respond, grabbed the identity badge that was hanging on a lanyard around Mr. Messina's neck. (TR 1224:5-17; TR 1225:5-8 (Mr. Messina)) He neither asked nor received Mr. Messina's permission to look at or touch his

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identity badge -- much less to grab it. (TR 1225:9-11 (Mr. Messina))

82. On March 22, 1994, Mr. Haynes met with Complainant to discuss a grievance that Complainant filed concerning the assignment of overtime. According to Mr. Haynes, the meeting went quite well, but at the end, Complainant remarked that he would "shove it up [management's] expletive." (TR 1769:16-24 (Mr. Haynes); RX 79 at 2)

83. On March 23, 1994, Complainant gave Mr. Bergh some paperwork concerning a needed repair to a piece of equipment. (TR 1011:6-8 (Mr. Bergh)) After a brief, but "professional" discussion (TR 1011:25 (Mr. Bergh)), Complainant turned his back

to Mr. Bergh and commented as he walked through the doorway, "[You] [can] put that with everything else that doesn't get done around here." (TR 1012:10-12 (Mr. Bergh); RX 46)

84. Mr. Bergh initially considered making an on-the-spot correction, but, in a moment of caution, changed his mind. TR 1012:23-25; TR 1013:1 (Mr. Bergh) Again, Mr. Bergh stayed his hand and declined to discipline Complainant. (TR 1013:2-17 (Mr. Bergh))

85. Two days after Complainant's disrespectful behavior and remarks to Mr. Bergh, Mr. Bergh saw Complainant sleeping at his work bench. (TR 1016:12-18 (Mr. Bergh)) Mr. Bergh stood in front of Complainant for about half a minute, watching him sleep. (TR 1016:12-17 (Mr. Bergh)) When Mr. Bergh emphatically called out "Pete," Complainant rolled his head over and awoke, (TR 1016:17-25; TR 1017:1-10 (Mr. Bergh); RX 47)) appearing "embarrassed and flustered." (TR 1018:12-13 (Mr. Bergh))

86. Disturbed by the flagrancy of his sleeping, but not wanting to have to resort to discipline, Mr. Bergh decided to write a simple note to Complainant to "invit[e] [him] to come back into the fold." (TR 1020:22-23 (Mr. Bergh)) He wrote a note that reminded Complainant of Mr. Bergh's expectations on his attentiveness and asked for his cooperation and support as the unit completed a refueling outage. (RX 48) The note was neither harsh nor chastising.

87. In April 1994, Mr. Drexel Harris, an engineer in the Licensing Department, was assisting Mr. Bergh with various technical issues raised by Complainant. (TR 1029:15-17 (Mr. Bergh)) While Mr. Harris and Complainant were working together one day, Complainant mentioned the name of Karen Silkwood. (TR

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1476:18-24 (Mr. Harris)) He then noted his own alleged concern about a (perfectly safe) sump pump, and remarked that, "It just seems strange." (TR 1477:5-9 (Mr. Harris)) Although Mr. Harris did not regard Complainant's remark as anything serious or even a problem, (TR 1479:4-18 (Mr. Harris)) he nevertheless mentioned it the next day to Mr. Bergh out of an abundance of caution. (TR 1479:7-18 (Mr. Harris))

88. When he did, Mr. Bergh immediately contacted the Senior Vice-President at Millstone, Mr. Don Miller (TR 1030:1-24 (Mr. Bergh)) Together, they quickly decided to, have an independent investigation conducted and to have Complainant work in a safer environment. (TR 1031:1-11 (Mr. Bergh)) Accordingly, Mr. Bergh temporarily assigned Complainant to work with the Procedure Upgrade Group. (TR 1032:22-24 (Mr. Bergh)) Complainant had no objection. (TR 1032:13-18 (Mr. Bergh))

89. A contractor, Mr. Gil Morrell, heads Respondent's Procedure Upgrade Group. (TR 598:18-25; TR 599:1-22 (Mr. Morrell)) When Mr. Bergh temporarily changed Complainant's assignment, Mr. Bergh informed Mr. Morrell that Complainant could assist the procedure writers by providing research, but that all

matters concerning his personal time would continue to be handled by the chain-of-command, i.e., Mr. Boyer, Mr. Peterson, and Mr. Bergh. (TR 1033:4-12 (Mr. Bergh)) As Mr. Morrell explained on cross-examination, "as a consultant, [he] [has] no administrative supervisory function." (TR 605:16-18 (Mr. Morrell) (emphasis added))

90. While Complainant worked with that Group, Mr. Robert Beveridge, a safety administrator from the corporate headquarters, conducted an independent investigation into Complainant's alleged concern for his personal safety. (TR 1036:2-17 (Mr. Bergh)) Mr. Beveridge concluded that Complainant was never in any danger and that the pipe trench and sump pump arrangement about which he complained could not have resulted in his receipt of an electrical shock. (RX 7) Moreover, he found "no evidence to support the concern that supervision at Millstone Unit I is trying to create an environment that would cause Complainant personal injury, induce him to be discharged or to voluntarily resign from Millstone Station." (*Id.* at 2)

91. Mr. Beveridge submitted his report on May 2, 1994. (RX 77) Because Mr. Beveridge concluded that Complainant was in no danger, either real or perceived, Mr. Bergh prepared to return him to his original assignment as a mechanic. (TR 1041:17-25) Before that occurred, however, Mr. Don Miller called Mr. Bergh to

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inform him that Complainant had called Mr. Miller and asked to remain in the Procedure Upgrade Group. (TR 1042:1-3 (Mr. Bergh)) Mr. Bergh agreed to honor his request. (TR 1042:7-8 (Mr. Bergh))

92. Later, in May of 1994, Mr. Haynes met with Complainant to discuss his concerns about two issues. During the course of that meeting, the two discussed his future with the company. (TR 1778:1-2 (Mr. Haynes)) Mr. Haynes asked Complainant hypothetically, if he could choose from various jobs, which he would prefer. (TR 1778:4-25; TR 1779:1-7 (Mr. Haynes)) Complainant replied that he would like to be a member of the "I-Team," which would require an 18 to 20 month assignment to the Work Planning and Control Department. (TR 1779:5-7 (Mr. Haynes); TR 1566:15-19 (Mr. Mike Ross))

93. True to his word, Mr. Haynes contacted Mr. Bergh and Mr. Ross to discuss a possible assignment of Complainant to the I-Team. (TR 1567:1-16 (Mr. Mike Ross)) Mr. Bergh and Mr. Mike Ross responded favorably to the idea. (TR 1567:17-25; TR 1568:1-20 (Mr. Mike Ross); TR 1046:3-11 (Mr. Bergh)) Mr. Bergh noted that Complainant had previously asked about this assignment when the I-Team was first created. (TR 1044:23-25 (Mr. Bergh))

94. To organize the transition of Complainant and his two coworkers into the I-Team, Mr. Ross and Mr. Bergh attempted to have a meeting with the new members during the late-morning of Friday, June 17, 1994. (TR 1046:20-25 (Mr. Bergh)) Mr. Bergh went to Complainant's work area in the Procedure Upgrade Group to contact Complainant, but he was not there. (TR 1047:1-4 (Mr.

Bergh)) Mr. Morrell was not there either and the procedure writers in the area did not know where Complainant was. (TR 1047:4-7 (Mr. Bergh)) Mr. Bergh then paged Complainant, but received no response. (TR 1047:8-9 (Mr. Bergh)) Unable to locate Complainant, Mr. Bergh and Mr. Ross cancelled the meeting. (TR 1047:10-17 (Mr. Bergh); TR 1570:12-13 (Mr. Mike Ross))

95. Later that day, however, Mr. Bergh received a telephone call from a former supervisor in his department who mentioned that he saw Complainant sitting in a van in the parking lot earlier that day. (TR 1048:3-8 (Mr. Bergh))

96. Because of this information, Mr. Bergh and Mr. Ross asked to speak with Complainant on June 20, 1994, after they conducted the delayed I-Team organizational meeting. (TR 1050:11-25; TR 1051:1-15 (Mr. Bergh)) When told that Mr. Bergh had tried to find him on the morning of June 17, 1994, Complainant replied that he had a physical examination. (TR

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1051:18-23 (Mr. Bergh); RX 51) Mr. Bergh then asked if he left the protected area that morning. (TR 1052:2-5; RX 51) Complainant's composure visibly changed and his face reddened. (TR 1052:4-7 (Mr. Bergh)) After pausing, he indicated that he may have gone to the technical library, the credit union, the Human Resources offices, and met with Mr. Anthony "Tony" Ross. (TR 1052:9-15 (Mr. Bergh); RX 51) He then indicated that perhaps he went to the credit union or Human Resources office on Thursday. (TR 1052:13-15 (Mr. Bergh); RX 51) Mr. Bergh followed up by asking specifically, "Well, how long did you meet with Tony Ross?" (TR 1052:19-25; TR 1053:1-5 (Mr. Bergh)) Complainant replied, "a half hour or forty minutes." (TR 1052:20 (Mr. Bergh); TR 1572:20-21 (Mr. Mike Ross); RX 51) Complainant conceded that it was "personal business" and that he did not have Mr. Morrell's permission to be in the parking lot with Mr. Ross. (TR 1053:8-25 (Mr. Bergh); TR 1054:1-7 (Mr. Bergh); TR 1573:5-9 (Mr. Mike Ross))

97. Complainant asserted on cross-examination that Tony Ross called him at about 9:00 a.m., June 17, 1994, to ask Complainant to provide him with a copy of the Respondent's Employee Handbook -- "You and Your Job." (TR 519:8-14 (Mr. Reynolds)) Complainant agreed to obtain a copy and provide it to his friend at about 10:30 a.m. that morning, in the vicinity of the credit union, which is outside of the protected area. (TR 519:15-25; TR 520:1-4 (Mr. Reynolds)) According to Complainant, Mr. Ross did not want to be seen in the Personnel Office because "he did not want Personnel to suspect that he was looking into company policies and plans." (RX 3 at 8; See also TR 524-26 (Mr. Reynolds))

98. Respondent provides the handbook to all of its employees. (TR 1713:1-2 (Ms. Fleming)) The handbook is nothing more than a summary of the company's personnel policies, procedures and programs. (TR 1713:2-4 (Ms. Fleming)) In the introduction to the handbook, the President and Chief Executive Office of Northeast Utilities "urge[s] [each employee] to read it carefully and keep it on hand." (RX 89 at i) The company gives

the book to its employees and expects them to have the book. In fact, to the extent any implication arises from the possession of, or interest in the book, the implication is favorable, because it suggests a higher level of care, conscientiousness and dedication by that employee. (TR 1714:21-25 (Ms. Fleming))

99. The process of acquiring a replacement copy of the book is as benign as the book itself. To obtain a copy, an employee simply has to ask a secretary in the Human Resources office. (TR 1713:21-25; TR 1714:w-5 (Ms. Fleming)) Indeed, that is all

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Complainant did. (TR 523:17-18 (Mr. Reynolds))

100. The Millstone gate log establishes that on June 17, 1994, Complainant left the protected area at the North Access Point at 10:10 a.m., and returned through the North Access Point at 11:23 a.m. (RX 50)

101. In view of Complainant's testimony about the timing of his activities while outside the protected area, he has accounted for only thirty-three minutes of the seventy-three minutes spent out of the protected area, not counting his time in Mr. Ross' van.

<i>Location</i>	<i>Approximate Time Spent (minutes)</i>
Personnel office	5
Technical Library	15
Looking' for Ross	3
NRC Office	5
Waiting for Ross	5

Total Time	33 minutes
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Thus, according to Complainant's own testimony and statements, he spent about forty minutes (73 minus 33) with Mr. Ross. That is precisely the amount of time that he said he spent with Tony Ross when confronted by Mr. Bergh and Mr. Mike Ross on June 20, 1994. (RX 51) (Complainant admitted during that meeting that he spent between 30 and 40 minutes on personal business with Mr. Ross in the parking lot.) His direct testimony -- that he spent "maybe ten, fifteen minutes" with Mr. Ross (TR 172:3-6 (Mr. Reynolds)) - is false and hereby rejected.

102. With yet another unauthorized absence by Complainant to contend with, Mr. Bergh contacted Ms. Fleming and requested that she consider termination. (TR 1059:15-19 (Mr. Bergh)) Ms. Fleming discussed the matter with Mr. Bergh and Mr. Haynes and then contacted Mr. Pawloski at the corporate Labor Relations office to solicit his advice. (TR 1715:13-21 (Ms. Fleming)) Mr. Pawloski met personally with Mr. Bergh and Mr. Haynes to review the details of the latest unauthorized absence and to ensure himself that termination was warranted. (TR 1667:20-25 (Mr. Pawloski)) Mr. Pawloski concluded that termination was not only appropriate, in view of Complainant's prior history of

discipline, but that it was also consistent with other disciplinary action taken throughout the Northeast Utilities system. (TR 1668:1-21 (Mr. Pawloski)) Finally, Mr. Pawloski

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found nothing that led him to even suspect that the raising of safety concerns played a role in the decision to terminate Complainant's employment. (TR 1668:22-25; TR 1669:1-6 (Mr. Pawloski)) Similarly, Ms. Fleming testified that Complainant's termination was perfectly consistent with the company's policy of constructive, progressive discipline and totally unrelated to the raising of safety concerns. (TR 1716:18-23 (Ms. Fleming))

103. Respondent terminated Complainant's employment on June 27, 1994. (RX 52)

In view of the foregoing Findings of Fact, I now make the following:

ADDITIONAL CONCLUSIONS OF LAW

1. Complainant failed to establish a *prima facie* case that his involvement in protected activity was the likely reason for his discharge.
2. Even if Complainant had established a *prima facie* case, Respondent proved by clear and convincing evidence that it terminated Complainant's employment for legitimate, nondiscriminatory reasons.
3. Specifically, Respondent proved that it terminated Complainant's employment because of his repeated acts of misconduct and because years of counseling, coaching, warning, and prior, progressive discipline failed to cause him to correct his performance deficiencies or to cease his misconduct.
4. Complainant failed to present any credible evidence that Respondent's basis for his termination was simply a pretext.
5. Respondent also proved by clear and convincing evidence that it would have terminated Complainant's employment irrespective of any protected activity by Complainant.
6. Complainant failed to sustain his ultimate burden of proof.
7. Respondent did not violate any provision of the Energy Reorganization Act, when it terminated the Complainant's employment on June 27, 1994.

Based on the foregoing, I find and conclude that Complainant failed to satisfy his burden of presenting a *prima facie* case. The overwhelming weight of the evidence proves that Respondent's sole motive for terminating Complainant was its conclusion that Complainant's egregious conduct on June 17, 1994, the final straw in his relationship with the Respondent, warranted termination.

RECOMMENDED ORDER[17]

On the basis of the foregoing, I recommend that the complaint filed by Clarence O. Reynolds shall be, and the same hereby is DISMISSED WITH PREJUDICE.

DAVID W. DI NARDI
Administrative Law Judge

[ENDNOTES]

[1]

The following abbreviation shall be used herein: "ALJ"-Administrative Law Judge Exhibits, "CX"-Complainant Exhibits, "EX"-Respondent Exhibits, "TR"-Transcript.

[2]

42 U.S.C. §5851(b) (3) (c) (1995 Supp.).

[3]

42 U.S.C. §5851(b) (3) (D) (1995 supp.).

[4]

TR 378:3-8 (Complainant admitted that Mr. Lord was "obligated" to stop the job); TR 378:18-22 (Complainant conceded that Mr. Lord was "absolutely correct" in stopping the job).

[5]

There is a dispute regarding whether or not purely internal complaints to management constitute protected activity, however, the Secretary of Labor has issued decisions which find that an employee is protected when engaging in this particular activity. See S. KOLIN, *THE WHISTLEBLOWER LITIGATION HANDBOOK* 37, 43 (1990); compare *Kansas Gas & Elec. Co. v. Brook*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986) (court upheld Secretary of Labor's position that employee protection provision of Energy Reorganization Act protects purely internal complaints) with *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984) (court held that quality control inspector's internal filing of intra-corporate complaint was not protected activity).

[6]

Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1162 (9th Cir. 1984); *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46, slip op. at 9-10 (Sec'y Feb. 15, 1995); *Dartey v. Zack Co.*, Case No. 82-ERA-2, slip op. at 7-8 (Sec'y Apr. 25, 1983).

[7]

Carroll, Case No. 91-ERA-46, slip op. at 9-10.

[8]

Carroll, Case No. 91-ERA-46, slip op. at 11. (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981)).

[9]

Carroll, Case No. 91-ERA-46, slip op. at 10.

[10]

113 S.Ct. 2742 (1993).

[11]

Id. at 2754 (emphasis in original).

[12]

Carroll, Case No. 91-ERA-46, slip op. at 10 *citing St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742); *see also Hemeon v. Boston Edison Co.*, Case No. 94-ERA-34, slip op. at 3-4 (ALJ Dec. 29, 1994).

[13]

Dysert v. Westinghouse Elec. Corp., Case No. 86-ERA-39, slip op. at 4-5 (Sec'y Oct. 30, 1991) (emphasis added).

[14]

Rand v. CF Industries, Inc., 42 F.3d 1139, 1145 (7th Cir. 1994) (citation omitted).

[15]

Id. at 1146.

[16]

Carroll, Case No. 91-ERA-46, slip op. at 10 (citation and footnote omitted).

[17]

The FINAL ORDER shall be issued by the Secretary of Labor.